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Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20006

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Office of Proceedings
SEP 20 2006
Part of
Public Record

Re: STB Docket No. AB-290 (Sub-No. 286), Norfolk Southern Railway
Company - Adverse Abandonment - St. Joseph County, IN

Dear Mr. Williams:

On September 8, 2006, I wrote to the Board that Norfolk Southern Railway Company (NSR) had received from counsel for the City of South Bend, IN a Petition for Waiver in a forthcoming adverse abandonment filing that the City captioned as STB Docket No. AB-290 (Sub-No. 275), Norfolk Southern Railway Company - Adverse Abandonment - In St. Joseph County, IN. This filing had not yet been posted on the Board's web site. I advised that the docket number used by the petitioners duplicated a docket number that NSR used just that week in another filing. (We will refer to these parties here as petitioners although they will become applicants when they file their application.) Since the date of that letter, the docket number of the impending adverse abandonment application has been changed to STB Docket No. AB-290 (Sub-No. 286). In the meantime, our previous letter was placed in the file in No. AB-290, Sub-No. 275X. NSR files this letter in order to have our views on the petition for waiver filed in the proper docket. Since the Board has not issued a decision on the petition for waiver, we also express the previously submitted general views more specifically than we expressed them in our September 8, 2006 letter.

I previously wrote that NSR does not oppose the City's, and the other expected applicants, the Sisters of the Holy Cross, Inc. and the Brothers of the Holy Cross, Inc. request for waiver to the extent it is consistent with Board decisions granting waiver requests in previous adverse abandonment proceedings. However, NSR did not and does not assent to any waiver request that is not consistent with Board precedent and

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procedure. NSR requested that the Board evaluate whether to grant any waiver that petitioners request based on precedent and the Board's requirements for filings in this type of case. I did not specifically identify any of these excessive requests because I thought we should correct the duplicate docket number assignment quickly and I was otherwise subject to time constraints, including several immediately following days out of the office, when I wrote the previous letter. In view of the current status of the proceeding, NSR now comments more specifically on waiver requests that appear to be contrary to the waivers usually granted by the Board in this type of proceeding in line with our general suggestion that the Board should review and consider not granting such waivers. The case has not proceeded to a further stage so that petitioners would be prejudiced by this more specific statement of our views.

NSR previously denied that, as a legal matter, there is a concept of "de facto abandonment" and objected to the assertion that the concept applied to the subject line, as stated by the petitioners. Upon a more careful reading of the petition, we note that petitioners used that statement in their draft notice of intent as well as in their petition. Petitioners also make assertions about the maintenance and safety of the line and that the easement underlying the line expired a number of years ago. These statements are unproven at this point in this proceeding. NSR will be prejudiced if these statements are allowed either as a rationale for waivers or as a basis stated in the notice for filing the application. Moreover, they are not necessary for either purpose.

NSR does not dispute the fact that no rail service has been provided over the line for several years. NSR does not object to petitioners' use of the assertion that there is a lack of foreseeable need for rail service over the line as a basis for their petition and the reason given for their filing in their notices, although they should be required to support this statement in their application. However, NSR believes this is a sufficient statement of petitioner's rationale for their notices and that they do not need to state facts yet to be proven or prejudicial to NSR's position. If petitioners believe it necessary to make and prove these assertions in their application, they are free to do so, but these statements should be removed from the notices.

NSR would not object to the retention of the sentences in the notices stating that the lines traverse the properties of the Sisters of the Holy Cross, Inc. and the Brothers of the Holy Cross, Inc. and that the Sisters and Brothers assert a claim under Indiana law to a reversionary interest in the railroad right-of-way, although we believe that the word "legitimate" is a conclusion that requires proof and should not be used in the notice.

NSR can find no ICC or STB decision or other support for petitioners' statement that the line between Milepost ZO 9.6 and ZO 10.5 has been formally abandoned,

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regardless whether tracks may have been removed from this segment of the line. NSR requests that petitioners include in their application the entire segment between MP ZO 9.3 – ZO 10.55, if they have standing to assert a claim with respect to the entire segment. Otherwise, a small segment of the line may remain an island and officially an unabandoned line of railroad if petitioners receive the relief they intend to request from the Board. In addition, our research discloses that the line does contain a dormant or former station named "Notre Dame" and we believe the notice should so state.

While NSR's employees are represented by labor organizations, NSR notes that the Board has granted previous requests for waiver of service of the notice of adverse abandonment applications on the headquarters of all duly certified labor organizations. However, we also note that petitioners' cited rationale that the anticipated application will be a "complete abandonment" is not applicable to the abandonment of a small segment of a line of a larger system.

NSR believes the Board should not waive the requirement for newspaper publication of the abandonment notice because an applicant can not be sure that it will serve all interested parties, as prior Board cases in which additional parties asserting an interest in the proceeding appear unexpectedly have shown.

NSR notes that the Board has not waived the requirements for environmental and historic reports in adverse abandonment application cases. The case cited by petitioners, although styled as an abandonment, was actually an adverse discontinuance case because the applicant represented that rail service would continue over the line. While petitioners may well be correct that the abandonment of the line will have no adverse effect on the environment, that does not necessarily provide a basis for waiver of submission of an environmental report and the notice and consultation provisions that precede or accompany such a submission.

NSR is willing to check its list of bridge and structures for the line to confirm that there are none that need to be reported to the State Historic Preservation Officer.

While petitioners may request an exemption or other relief from the Offer of Financial Assistance (OFA), public use or trails use procedures in their application, it is premature and inappropriate for the Board to grant such waivers in a preliminary motion before all parties are heard or to exclude information about such procedures from notices. The Board should defer a decision on these matters and require petitioners to include the standard provisions for these procedures in their notices. Of course, petitioners may make such further statements concerning their intent to seek relief from these requirements as they deem appropriate.

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With respect to the contents of the application, the petitioners obviously have made representations as to the condition of the line and they should be required to make at least some statement concerning the condition of the line in their application. They should also assert to the extent of their information and belief, the length of time that the line has been inactive, as they have done in the petition for waiver. The line is a former Conrail line. In the stage of this proceeding on the merits, NSR will submit such information as it has on the date the last rail service over the line was provided.

NSR does not waive any requirement for the City or any other party to show that they have standing to file the application and to pursue relief with respect to all or part of the subject line of railroad or otherwise to prove their interests in this matter. Thus, NSR does not waive any objection it may have to a party's standing to bring the proposed application or to pursue relief in this matter in whole or in part should it appear that any applicant lacks standing to file an application or to pursue requested relief in this case in whole or in part.

In stating its lack of opposition to the petition for waiver to the extent it is consistent with past precedent, NSR does not acquiesce in or waive its right to object to or reply to any factual or legal assertion made in the petition for waiver in submissions on the merits of the application. Without limitation on its right to make any other argument, NSR asserts that the City and other applicants should be required to fully support their position, factually and legally, in their application. Applicants should be required to prove their case in conformity with applicable legal precedent such as *Modern Handcraft, Inc. - Aband.*, 363 I.C.C. 969 (1981) and later ICC, STB and court decisions.

Respectfully submitted,



James R. Paschall

cc via e-mail attachment:

Mr. Richard H. Streeter

Mr. John D. Heffner